

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JUNE 29, 2000

IN RE:)
)
PETITION OF THE TENNESSEE SMALL LOCAL)
EXCHANGE COMPANY COALITION FOR) **DOCKET NO. 99-00613**
TEMPORARY SUSPENSION OF 47 U.S.C. § 251(b))
AND 251(c) PURSUANT TO 47 U.S.C. § 251(f) AND)
47 U.S.C. § 253(b))

**ORDER ADOPTING FIRST REPORT AND RECOMMENDATION
OF PRE-HEARING OFFICER**

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on February 15, 2000 for consideration of the first Report and Recommendation filed by the Pre-Hearing Officer on February 8, 2000.

On August 18, 1999, the Tennessee Small Local Exchange Company Coalition (the "Coalition") filed a Petition requesting a temporary suspension of the requirements of Sections 251(b)(1), (2), (4) and 251(c) of the Telecommunications Act of 1996 (the "Act"), pursuant to Sections 251(f)(2) and 253(b). At a regularly scheduled Authority Conference held on October 26, 1999, the Directors of the Authority voted unanimously to open a contested case in this docket and granted all petitions to intervene. The Directors also voted unanimously to appoint General Counsel or his designee to serve as the Pre-Hearing Officer for the purpose of establishing issues and otherwise preparing this matter for consideration by the Directors. The Southeastern Competitive Carriers Association ("SECCA"); US LEC of Tennessee, Inc. ("US LEC"); AT&T Communications of the South Central States, Inc.

("AT&T"); and Hyperion of Tennessee, L.P. ("Hyperion") are participating as intervenors in this proceeding.

Pursuant to a Notice dated December 6, 1999, a Pre-Hearing Conference was held on December 16, 1999 for the purposes of framing the issues and setting a schedule for the filing of discovery and testimony in this matter. Each party filed a list of proposed issues for consideration at the December 16, 1999 Pre-Hearing Conference. At that Pre-Hearing Conference, the parties agreed that the Pre-Hearing Officer should evaluate the proposed issues and develop a list of issues for the disposition of this docket

On February 8, 2000, the Pre-Hearing Officer filed a Report and Recommendation reflecting the activity at the December 16, 1999 Pre-Hearing Conference. A copy of the Report is attached as **Attachment A**. The list of issues for consideration in this docket, as developed by the Pre-Hearing Officer from the proposed lists of the parties, was incorporated in the Report and Recommendation. On February 11, 2000, AT&T filed objections to that Report stating that Issue 3(b) of the List of Issues "does not include the FCC's definitive and binding interpretation of 'unduly economically burdensome' as that term is used in Section 251(f)(2)." (*Objections of AT&T*, p. 1) AT&T objected further to the Pre-Hearing Officer's articulation of a potential stipulation between the Coalition and the Intervenors as being an inaccurate statement.

The Directors considered the Report and Recommendation at a regularly scheduled Authority Conference held on February 15, 2000. During consideration of the Report, the Pre-Hearing Officer accepted AT&T's objections as clarifications to the Report and Recommendation. By a vote of two to one,¹ the Directors approved the Report and accepted

¹ Director Kyle voted against approval until the parties of this lawsuit are clarified or defined and upon the basis that any pertinent actions of the Supreme Court pertaining to this particular situation be reviewed.

the recommendations contained therein as to the procedural schedule as well as the filing of briefs on the issue of consolidation of this proceeding with Docket No. 00-00026. Additionally, the majority of the Directors determined that the Pre-Hearing Officer should resolve the objections of AT&T, permit other parties to address the objections to the Report and clarify any issue that might exist relating to the identity of the members of the Coalition.

IT IS THEREFORE ORDERED THAT:

1. The Report and Recommendation of the Pre-Hearing Officer, attached to this Order as Attachment A, is approved and incorporated into this Order as if fully rewritten herein; and
2. The Pre-Hearing Officer shall resolve the objections of AT&T to the Report and Recommendation.


Mervin S. Malone, Chairman


H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary

*** Director Kyle did not vote to approve the Report and Recommendation.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

FEBRUARY 8, 2000

IN RE:

**PETITION OF THE TENNESSEE SMALL LOCAL
EXCHANGE COMPANY COALITION FOR
TEMPORARY SUSPENSION OF 47 U.S.C. § 251(b)
AND 251(c) PURSUANT TO 47 U.S.C. § 251(f) AND
47 U.S.C. § 253(b)**

DOCKET NO. 99-00613

REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

On August 18, 1999, the Tennessee Small Local Exchange Company Coalition (the "Coalition") filed a Petition with the Tennessee Regulatory Authority (the "Authority") requesting a temporary suspension of the requirements of Sections 251(b)(1), (2), (4) and (5) and 251(c) of the Telecommunications Act of 1996 (the "Act"); such Petition was filed pursuant to Sections 251(f)(2) and 253(b). Petitions to Intervene in this docket were filed by US LEC of Tennessee, Inc. ("US LEC") on September 15 and the Southeastern Competitive Carriers Association ("SECCA") on September 24, 1999. On September 29, 1999, the Authority received the following: Comments and Petition to Intervene filed by AT&T Communications of the South Central States, Inc. ("AT&T"); Comments, Petition to Intervene and Proposed Order filed by Hyperion of Tennessee, L.P. ("Hyperion"), and Motion to Dismiss filed by SECCA. The Coalition responded to the petitions and the motion to dismiss on October 15, 1999.

ATTACHMENT

A

At a regularly scheduled Authority Conference held on October 26, 1999, the Directors of the Authority voted unanimously to open a contested case in this docket and granted all petitions to intervene. The Directors also voted unanimously to deny SECCA's Motion to Dismiss without prejudice and to appoint General Counsel or his designee to serve as the Pre-Hearing Officer for the purpose of establishing issues and otherwise preparing this matter for consideration by the Directors.¹

Pre-Hearing Conference

On December 2, 1999, a Notice of Filing Schedule was sent to all parties. On December 6, 1999, a second Notice that superceded the schedule in the first notice was sent to all parties. Pursuant to the second Notice, a Pre-Hearing Conference was held on December 16, 1999 for the purposes of framing the issues and setting a filing schedule for discovery and testimony in this matter.

Parties in Attendance

Attending the December 16, 1999 Pre-Hearing Conference were the following parties:

Tennessee Small Local Exchange Company Coalition (the "Coalition") – **Dale Grimes**, Esquire and **T.G. Pappas**, Esquire, Bass, Berry & Sims PLC, 2700 First American Center, Nashville, TN 37238;

US LEC of Tennessee, Inc. ("US LEC"), Hyperion of Tennessee, L.P. ("Hyperion"), Southeastern Competitive Carriers Association ("SECCA") – **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

AT&T Communications of the South Central States ("AT&T") – **James P. Lamoureux**, Esquire, 1200 Peachtree Street, NE, Atlanta, GA 30309.

¹ An Order dated January 5, 2000 was entered reflecting the action of the Directors.

The Coalition's Waiver of the 180-day Requirement

The Pre-Hearing Officer first addressed the requirement set forth in Section 251(f)(2)(B) of the Act that the Authority act upon any petition filed under Section 251(f)(2) within 180 days after receipt of such petition. The Petitioner agreed to waive the 180-day requirement.

Issues for Consideration in this Proceeding

Pursuant to the Notice of December 6, 1999, each party was requested to file a list of proposed issues for consideration at the Pre-Hearing Conference. Lists of proposed issues were filed by the Coalition, SECCA, and AT&T on December 14, 1999. The proposed issues filed by SECCA were adopted by Hyperion and US LEC.

During the Pre-Hearing Conference, SECCA's Issue No. 5 was resolved when the parties agreed that discovery may be directed to a particular Coalition member and that the evidence would be presented and a decision would be rendered on a company-specific basis.² Additionally, the parties agreed to strike Issue No. 4 of the US LEC, Hyperion and SECCA issues list.³ The Coalition proposed, as an additional issue, whether the Coalition is entitled to obtain discovery of the individual members of SECCA in this docket. AT&T requested that this docket not include any issues that do not coincide with the criteria set forth in the Act or the Federal Communications Commission regulations.

² Issue No. 5: Whether, for purposes of discovery, the presentation of evidence and consideration of the requirements discussed in issues 1, 2 and 3, each member of the Coalition should be considered "on a case-by-case basis?" *Preliminary Issues List of SECCA and adopted by US LEC and Hyperion.*

³ Issue No. 4: Whether each member of the Coalition should be made a party to this proceeding?

The parties also agreed that the Pre-Hearing Officer should evaluate the proposed issues and develop a list of issues for the disposition of this docket. The list of issues for consideration in this docket is attached as Exhibit A.

The Pre-Hearing Officer addressed the possibility of stipulations regarding proof of facts or documentation. US LEC, Hyperion, AT&T and SECCA stated that they would stipulate that the Coalition met the two percent (2%) requirement of Section 251(f)(2) if the Coalition would submit data on its members' access lines. The parties also agreed that they would stipulate to certain financial information.

Request for Interconnection by US LEC

During the Pre-Hearing Conference, the Pre-Hearing Officer discussed a letter dated December 7, 1999, but received on December 16, 1999; such letter referenced a request by US LEC to the TDS TELECOM companies.⁴ US LEC's letter requested interconnection services and termination of the TDS companies' rural exemption status by the Authority pursuant to Section 251(f)(1)(B) of the Act.⁵ The Pre-Hearing Officer expressed concern as to whether a copy of a letter sent to a third party constituted notice to the Authority as required by the Act. US LEC's counsel stated that US LEC would clarify its request in a filing with the Authority and that such filing would serve as notice to the Authority of US LEC's request for interconnection with the TDS companies and

⁴ The TDS TELECOM companies are Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company and Tennessee Telephone Company. The TDS TELECOM companies, collectively are members of the Coalition.

⁵ Pursuant to Section 251(f)(1)(B), a party making a bona fide request of a rural telephone company for interconnection, services or network elements shall submit notice of its request to the State commission. Within 120 days of receipt of the notice, the State commission must conduct an inquiry to determine whether the request is not unduly burdensome, is technically feasible and is consistent with Section 254 of the Act and issue a decision on whether to terminate the rural exemption. Section 254 sets forth the universal service requirements.

for the termination of the TDS companies' rural exemption. The 120-day time period would begin to run from the date of such filing.

In concert with US LEC's offer to clarify its request in a filing with the Authority, the parties also discussed whether such a request should be consolidated with this docket. Counsel for US LEC proffered that the issues that would arise out of US LEC's request for interconnection with the four TDS companies would be identical to the issues in the present docket and therefore the proceedings should be consolidated. Counsel for the Coalition, while acknowledging that a proceeding initiated to address the US LEC request would contain similar substantive issues, contended that a determination by the Authority to terminate the TDS companies' rural exemption would require the TDS companies and US LEC to negotiate an interconnection agreement. The Coalition argued that proceeding with the current docket and possible negotiations should TDS' rural exemption be terminated would be inappropriate and as such, requested a suspension of any requirement for interconnection and for any time limits that may arise as the result of action by the Authority on a bona fide request for interconnection.

The Pre-Hearing Officer suggested that, in an effort to expedite the resolution of an issue of consolidation of the current docket and future dockets, the parties should brief the issue as part of this docket. US LEC, after agreeing to clarify its request to the TDS companies in a filing with the Authority, proposed to file a cover letter stating that the issues in a potential docket based on the request and the issues presented in the current docket were identical and therefore consolidation would be logical. Following the filing of the request by US LEC, the Coalition would have an opportunity to respond. The

Coalition agreed to file a response on the consolidation issue.⁶ Further, the Coalition maintained that its Petition seeks a suspension of the requirements of Section 251(c)⁷ to which the rural telephone company exemption extends, so that if granted, the Authority would not have to consider requests such as US LEC's request prior to a decision in the universal service proceeding (Docket No. 97-00888).

Procedural Schedule

During the December 16th Pre-Hearing Conference, the parties discussed several different ways of presenting discovery requests and filing testimony. Upon agreement of the parties, the Pre-Hearing Officer recommends the following filing schedule for this docket:

February 15, 2000	Petitioner's Discovery Completed and Direct Testimony due
March 15, 2000	Intervenors' Discovery Completed and Direct Testimony due
March 30, 2000	Petitioner's Rebuttal Testimony due

All pre-filed testimony shall be filed with the Authority by 2:00 p.m. on the date specified.

⁶ On January 14, 2000, US LEC filed with the Authority its request to TDS TELECOM for an interconnection agreement with TDS and its local exchange operating companies. US LEC did not contain within its cover letter a statement concerning the commonality of issues or a request for consolidation.

⁷ Section 251(c) imposes on incumbent LECs the duties of negotiation and to provide interconnection, unbundled access, resale, notice of changes, and collocation. The performance of these duties may be suspended under Section 251(f)(2) if a State commission determines that the suspension is necessary: (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible. Section 253(b) provides that a state regulatory agency may impose, on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

If the Petitioner determines, after review of the Intervenor's testimony, that additional discovery is necessary, a second round of discovery may be issued by the Petitioner in advance of filing Rebuttal Testimony.

Further, the parties agreed to allow the Pre-Hearing Officer to decide on all discovery objections and to permit the Pre-Hearing Officer's decision to be the final ruling on discovery.

Recommendations

Based upon the foregoing, the Pre-Hearing Officer **recommends** that the List of Issues attached to this Report and Recommendation as **Exhibit A** be approved as the issues for consideration in this proceeding. The Pre-Hearing Officer also **recommends** the procedural schedule as agreed to by the parties be adopted.

In light of the fact that US LEC has made a request for interconnection as indicated during the Pre-Hearing Conference and the parties have not yet addressed the consolidation issue in this docket, the Pre-Hearing Officer **recommends** that the Authority direct the parties to file briefs on whether the US LEC request should be consolidated with this proceeding. Such briefs could be filed ten (10) days after the Authority acts on this Report and Recommendation.

Richard Collier

RICHARD COLLIER ACTING AS
PRE-HEARING OFFICER

ATTEST:

K. David Waddell

K. David Waddell, Executive Secretary

DATE: *February 8, 2000*

LIST OF ISSUES

1. Whether each member of the Coalition qualifies as a rural telephone company as defined in 47 U.S.C. § 153(37).
2. Whether each member of the Coalition is qualified to request suspension or modification of the requirements of 47 U.S.C. § 251(b) or (c) as a rural carrier with fewer than two percent (2%) of the Nation's subscriber lines installed in the aggregate nationwide.
3. Whether each member of the Coalition can establish that suspension or modification of the requirements of 47 U.S.C. § 251(b)(1), (2), (4) and (5) and § 251(c) is necessary:
 - (a) to avoid a significant economic impact on users of telecommunication services generally;
 - (b) to avoid imposing a requirement that is unduly economically burdensome; or
 - (c) to avoid imposing a requirement that is technically infeasible.
4. Whether each member of the Coalition can establish that suspension or modification of the requirements of 47 U.S.C. § 251(b)(1), (2), (4) and (5) and § 251(c) is consistent with the public interest, convenience and necessity.
5. Whether, during the pendency of this action, the Authority should:
 - (a) suspend enforcement of the requirements of 47 U.S.C. § 251(b)(1), (2), (4) and (5) and § 251(c), pursuant to § 251(f)(2); and
 - (b) maintain the exemption established by § 251(f)(1) and suspend the effective date of any bona fide request for interconnection, services or network elements.



6. Whether a suspension or modification is necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers on a competitively neutral basis pursuant to § 253(b) and consistent with § 254 of the Act.
7. Whether the Petitioner is entitled to obtain discovery of the individual members of SECCA in this docket.